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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221666
Party	Plaintiff PepsiCo, Inc.
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Submission	Reply in Support of Motion
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Signature	/Lauren Beth Emerson/
Date	07/08/2016
Attachments	7.8.16 Pepsi Reply in Support of Motion to Compel (Opp. No. 91221666).pdf(534065 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Application Serial No. 86384378
Trademark: AQUAFIX
Filed: September 3, 2014

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PEPSICO, INC.	:	
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Opposer,	:	
	:	
vs.	:	Opposition No. 91221666
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MVS INTERNATIONAL INC.	:	
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Applicant.	:	
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**OPPOSER’S REPLY IN SUPPORT OF
MOTION TO COMPEL APPLICANT’S DISCOVERY RESPONSES**

Opposer, PepsiCo, Inc., (“Opposer” or “PepsiCo”), respectfully submits this brief in reply to *Applicant’s Response to Opposer’s Motion to Compel Applicant’s Discovery Responses* (“Response”). PepsiCo requests that the Trademark Trial and Appeal Board (“Board”) consider this reply in its determination of *Opposer’s Motion to Compel Applicant’s Discovery Responses* (“Motion to Compel”). This reply is being submitted to address certain inaccuracies in Applicant’s Response.¹ In particular, Opposer has raised with Applicant its discovery deficiencies on multiple occasions. No discussions or exchanges between the parties

¹ In support of *Opposer’s Reply In Support of Motion To Compel Applicant’s Discovery Responses*, PepsiCo relies on the pleadings, the records of the U.S. Patent and Trademark Office, and submits the Supplemental Declaration of Lauren Beth Emerson and Declaration of Paul A. Lee, filed herewith and incorporated into this memorandum by reference. References to the Supplemental Declaration of Lauren Beth Emerson and Declaration of Paul A. Lee shall be hereinafter identified as “Emerson Supp. Decl. ¶ ____”, and “Lee Decl. ¶ ____”, respectively.

to date have provided a basis from which Applicant could reasonably conclude that Opposer did not intend to move forward with discovery.

ARGUMENT

As an initial matter, Opposer's Motion to Compel has been only partially mooted by Applicant's June 27, 2016 service of *Applicant's Response to Opposer's Second Set of Interrogatories* to Applicant and a signed copy of *Applicant's Responses & Objections to Opposer's Requests for Admissions*. At least three issues raised by the Motion to Compel remain outstanding: Interrogatory No. 9, Document Request Nos. 15-18, and Request for Admission No. 11.

Contrary to Applicant's assertions, PepsiCo did not send "only one email" regarding these deficiencies. As spelled out more fully in the Motion to Compel, Opposer first brought to Applicant's attention PepsiCo's objection to the responses to Interrogatory No. 9 and Document Request Nos. 15-18 in its September 16, 2015 letter. (Bd. Docket 10 at Emerson Decl. Ex. D) PepsiCo followed up by email on October 6, 2015, and by email dated October 19, 2015. (Bd. Docket 10 at Emerson Decl. Ex. F) By letter dated November 4, 2015, Opposer reiterated those deficiencies and raised issues concerning Applicant's response to Request for Admission No. 11. (Bd. Docket 10 at Emerson Decl. Ex. L) PepsiCo sent to Applicant on December 4, 2015 yet another letter on each of these issues. (Bd. Docket 10 at Emerson Decl. Ex. Q) The March 18, 2016 email referenced by Applicant was the last in a series of concerted good faith efforts to resolve these issues without Board intervention. Indeed, that email expressly references and follows up on Opposer's December 4, 2015 letter. (Bd. Docket 10 at Emerson Decl. Ex. S)

Further, Applicant's statement that "the parties were actively negotiating a possible settlement and no Discovery requests were due at this time" is not correct, and there is no rational basis for Applicant to have such an "impression." The call log submitted by Applicant does not embody or reflect any "negotiations." In-house counsel for PepsiCo did call Applicant's counsel on February 16, 2016, but reached voicemail. (Lee Decl. ¶ 2) Applicant's counsel returned that call on March 3, 2016, and that brief call did not advance settlement. (Lee Decl. ¶ 3) Any doubt in Applicant's mind that Opposer intended to move forward with discovery at that point should have been eliminated by (i) Opposer's March 18, 2016 letter (Bd. Docket 10 at Emerson Decl. Ex. S), (ii) Opposer's production of unsolicited documents to Applicant on March 24, 2016 (Emerson Supp. Decl. ¶ 2), and (iii) Opposer's Motion to Extend All Dates by 90 Days filed on March 28, 2016, which points out Applicant's discovery deficiencies as a basis for the extension and makes no mention of settlement negotiations. (Bd. Docket 8).

In May, in-house counsel for PepsiCo reached out to counsel for Applicant again. (Lee Decl. ¶ 4) Twice the call was answered by an answering service. (*Id.*) When the parties connected on May 3, 2016, they quickly confirmed during the 16 minute call that there was no ground on which to settle the matter. (Lee Decl. ¶ 5) There was also no discussion of continuing settlement negotiations or of delaying discovery. (*Id.*) There was and is simply no basis for Applicant to reasonably conclude that it could disregard the outstanding discovery issues that had been flagged by Opposer on multiple occasions, and it is disingenuous of Applicant to suggest otherwise. *See National Football League, NFL Properties, LLC v. DNH Management, LLC*, 85 U.S.P.Q.2d 1852 (TTAB 2008) (denying party's request to modify the discovery schedule where party's conclusion that the case was not moving forward due to likely settlement

was unreasonable); *Instruments SA, Inc. v. ASI Instruments, Inc.*, 53 U.S.P.Q.2d 1925 (TTAB 1999) (same).

Finally, it bears mention that, notwithstanding Applicant's protests that it has diligently complied with its discovery obligations, Applicant has produced a mere two documents, and does not even attempt to justify its failure to provide full and complete responses to Interrogatory No. 9, Document Request Nos. 15-18, or Request for Admission No. 11.

Opposer submits its *Motion to Compel Applicant's Discovery Responses* supported by good cause and Opposer's good faith efforts to resolve these issues without Board intervention. PepsiCo therefore requests that the Board grant Opposer's Motion to Compel, at least with respect to Interrogatory No. 9, Document Request Nos. 15-18, or Request for Admission No. 11, and grant Opposer any further favorable relief that is just and proper in these circumstances.

Respectfully submitted,

BAKER BOTTS, L.L.P.

Date: July 8, 2016

By:



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Attorneys for Opposer
PepsiCo, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the date set forth below, a true and accurate copy of the foregoing **OPPOSER'S REPLY IN SUPPORT OF MOTION TO COMPEL APPLICANT'S DISCOVERY RESPONSES** was served on Applicant, MVS International, Inc., by email and express courier, at the following address of record:

HUMBERTO RUBIO
LAW FIRM OF RUBIO & ASSOCIATES PA
8950 SW 74TH CT STE 1804
MIAMI, FL 33156-3177
UNITED STATES
hrubio@rubiolegal.com



Dated: July 8, 2016

By: _____

Julie Beth Albert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of U.S. Application Serial No. 86384378
Trademark: AQUAFIX
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MVS INTERNATIONAL INC.	:	
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Applicant.	:	
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**SUPPLEMENTAL DECLARATION OF LAUREN BETH EMERSON IN SUPPORT OF
OPPOSER'S MOTION TO COMPEL APPLICANT'S DISCOVERY RESPONSES**

I, Lauren Beth Emerson, do hereby declare and state as follows:

1. I am an attorney associated with the law firm of Baker Botts L.L.P., representing Opposer, PepsiCo, Inc. ("Opposer" or PepsiCo") in the above-captioned proceeding. I am licensed to practice law in the states of New York and New Jersey, and I have been admitted to practice before the United States District Courts for the Southern District of New York and the District of New Jersey. I am over the age of twenty-one, have never been convicted of a crime, and am competent to make this declaration. This declaration is based on my personal knowledge and my review of documents and other material. I submit this declaration in support of *Opposer's Reply in Support of Motion to Compel Applicant's Discovery Responses*.

2. Opposer voluntarily produced documents to Applicant on March 24, 2016, notwithstanding the absence of any document requests or interrogatories services by Applicant.

Pursuant to 28 U.S.C. § 1746, I, Lauren Beth Emerson, further declare under penalty of perjury that all statements made herein based on my own personal knowledge are true and that all statements made on information and belief are believed to be true.

Date: July 8, 2016

A handwritten signature in black ink, appearing to read 'Lauren Beth Emerson', written over a horizontal line.

Lauren Beth Emerson

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In the matter of U.S. Application Serial No. 86384378

Trademark: AQUAFIX

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vs.	:	Opposition No. 91221666
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MVS INTERNATIONAL INC.	:	
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Applicant.	:	
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**DECLARATION OF PAUL A. LEE IN SUPPORT OF
OPPOSER'S MOTION TO COMPEL APPLICANT'S DISCOVERY RESPONSES**

I, Paul A. Lee, do hereby declare and state as follows:

1. I am Senior Director and Trademark Counsel for Opposer, PepsiCo, Inc. ("Opposer" or PepsiCo") in the above-captioned proceeding. I have been employed by PepsiCo since December 2014. I am licensed to practice law in the state of New York. In my capacity as Senior Director and Trademark Counsel for PepsiCo, I am responsible for the enforcement and administration of PepsiCo's trademarks. I am over the age of twenty-one, have never been convicted of a crime, and am competent to make this declaration. This declaration is based on my personal knowledge and my review of documents and other material. I submit this declaration in support of *Opposer's Reply in Support of Motion to Compel Applicant's Discovery Responses*.

2. I called Applicant's counsel on February 16, 2016, but reached voicemail.


3. Applicant's counsel returned my call on March 3, 2016, and that brief call did not advance settlement.

4. On or about May 2 and 3, 2016, I again reached out to counsel for Applicant to see if there might be a basis to settle the dispute. Twice, my calls were answered by an answering service.

5. We finally connected by phone on May 3, 2016, and spoke for approximately 16 minutes. During this call, we confirmed that there was no ground on which to settle the matter. We did not discuss continuing settlement negotiations or delaying discovery.

Pursuant to 28 U.S.C. § 1746, I, Paul A. Lee, further declare under penalty of perjury that all statements made herein based on my own personal knowledge are true and that all statements made on information and belief are believed to be true.

Date: July 6, 2016



Paul A. Lee